IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7292 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NARAYAN BAXI KAHAR

Versus

COMMISSIONER OF POLICE

Appearance:

MR VIJAY H PATEL for Petitioner

GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 18/02/98

ORAL JUDGEMENT

By this application, under Article 226 of the Constitution of India, the petitioner who is the detenue, calls in question the legality and validity of the detention order dated 28.9.97, passed by the Commissioner of Police, Baroda City on 28th September, 1997 invoking powers under Sec.3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act "); consequent upon which the petitioner came to be arrested

and at present is under detention.

2. In order to appreciate the rival contentions, necessary facts in brief may be stated. The Police Commissioner for the City of Vadodara had received certain information against the petitioner. There were six complaints lodged against the petitioner. Out of them, four complaints were lodged with Raopura Police Station and two complaints were lodged with the Prohibition Station. As alleged in the two out of first four complaints, the petitioner was found in possession of 5 litres of country liquor, in the third complaint he was found in possession of 15 litres of country liquor, whereas in the fourth complaint lodged with Raopura Police Station, he was found carrying 105 litres of country liquor in the auto rickshaw, and thus, the petitioner was found to have committed the offences punishable under sections 66(1)(b), 65(e) & 81 of Bombay Prohibition Act. In two complaints lodged against the petitioner with Prohibition Station, he was found carrying 273 litres of country liquor in Ambassador car and 175 litres of country liquor in the auto rickshaw and thereby he was found to have committed the offences punishable under sections 66(1)(b), 65(e) & 81 of Bombay Prohibition Act. The Commissioer of Police, having come to know about such complaints made detailed inquiry and after inquisition, he could note that the petitioner was a fiend and by his subversive activities, he was disturbing the public order and terrorising the people. After inquisition, the Police Commissioner confirmed that the petitioner was a head-strong person i.e. a tartar & decimator and by different criminal activities, he was terrorising the people. He was extorting money, causing injuries and/or causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order and spreading pandemonium were going berserk. No one was, therefore, ready to come forward and state against him. After a great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After a deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present, is in custody.

3. On behalf of the petitioner, challenging the impugned order, it is submitted that the order in question is passed after a great delay, as a result, the continuous detention has been rendered illegal. There was no justification for the authority passing the detention order to withhold the opportunity, exercising the privilege under Sec.9(2) of the Act. The detaining authority ought to have disclosed the particulars of the witnesses whose statements were recorded in support of the order passed. No doubt, under Section 9 of the Act, the authority has the privilege, but that is to be exercised judiciously, and not arbitrarily or capriciously so as to deprive the detenu of his right to have effective representation. As the particulars were not given, the petitioner was deprived of his right to have the effective representation against the order. The instances about the offences noted in the order were not sufficient to brand him a dangerous person, or to form a reasonable belief that maintenance of public order was adversely affected. The statements recorded are vague and necessary particulars when wanting the order is bad in law and is liable to be quashed.

4. Mr.U.R.Bhatt, the learned APP has vehemently refuted the allegations made, submitting that there is no delay on the part of the authority passing the order of detention, promptly order was passed, and in the public interest, certain facts & particulars are withheld. As both later on confined to the only point, I will not dwell upon other points.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be

against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the

detention order has to satisfy the court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. It is pertinent to note that the authority passing the impugned order has not filed the affidavit for which no cause is assigned. It can therefore be assumed that without any just cause the particulars are withheld, with the result the petitioner's right to make effective representation is marred. The detention therefore cannot be held good. The order of detention being arbitrary & illegal is therefore required to be set aside.

7. For the aforesaid reasons, this petition is allowed. The order of detention passed on 28th September, 1997 by the Police Commissioner, Baroda City, is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forth with, if not required in any other case. Rule accordingly made absolute.

Amp/- -----